

Goal to have Marketplace Seller Collect and Remit

A marketplace facilitator facilitates sales of a seller's products through a marketplace and engages in other specified activities as provided by the law and outlined above. Websites that merely advertise goods for sale and do not handle transactions do not meet the definition of a marketplace facilitator.

This raises the question, "If the marketplace facilitator is going to be required to collect and remit the sales/use tax, how can that be accomplished if the marketplace facilitator is not handling the customer's payment?"

Solution

- 1. Should there be common definitions for the terms such as "marketplace," "marketplace seller," "marketplace facilitator," "referral," and "referrer," or equivalent terms?**

Scott Letourneau's input

Use broad definition and have two categories

- If the marketplace seller processes the merchant payment, they are required to collect and remit sales tax for that seller.
 - Is the seller still required to register for a sales tax permit, since they are the ones filing the sales tax returns?
 - If yes, the marketplace facilitator must force compliance with registration of permits
 - If no, that means the marketplace facilitator is going to be filing state sales tax returns for every seller (not sure they will do that).
 - If the marketplace seller does NOT process the merchant payment, they are required to force compliance for that seller to collect and remit their own sales tax.
 - Once nexus is triggered in a state, the marketplace seller will notify the merchant and give them 60 or 90 days to apply for a sales tax permit and upload to the system of the marketplace sellers and, if not completed, the ability to sell in that state or their entire account is suspended; meaning if they have 5 states to apply for a permit and upload, they have to get compliant with all 5 states before their account is reinstated.
 - Referrer. I do believe that should be simpler and will leave it to the others to provide input.
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- 2. If a state establishes an economic nexus threshold for requiring collection of sales/use tax, does it clearly indicate when that threshold is met, triggering a registration obligation, with respect to a marketplace seller, marketplace facilitator, or referrer? Should states consider a sales volume economic nexus**

threshold, without an alternative separate number of transactions threshold, or include both sales volume and separate number of transactions in the threshold?

Scott Letourneau's input

- Get rid of the # of transactions per state and only focus on gross revenue. This will help 90% of small sellers not to have to register to collect and remit, because they may not be above the \$100K in a year, but they would pass the 200 sales in a year. If the states are counting on the lower transactions, then lower the sales volume to \$50K per year.
 - $\$100K/200 = \500 per unit and 99% of online sales are not on items for \$500 or more, so the math makes no sense. Again, I would vote to drop the transactions. No other country does it that way.
 - **States consider a second level nexus threshold for stock (Amazon FBA) or with inventory as the only nexus.**
 - If you only have stock, create a threshold.
 - \$10K in sales would be my recommendation.
 - This means the FBA seller does not need to register for a permit (even if the marketplace seller is collecting and remitting) until the sales are above \$10K in the state. This will save on permit registration fees and fees to have someone file your sales tax returns.
 - If you have nexus beyond stock, you must collect and remit from your first \$1 in sales.
 - If you have no nexus, go to the economic nexus levels for guidance.
- 3. Are registration and return filing requirements in conflict or duplicative? If the marketplace facilitator is required to register, collect and remit the sales/use tax on facilitated sales, then is there a need for the marketplace seller to register or report those same sales?**
- Key point. If you decide the seller does NOT have to register for a sales tax permit and the marketplace will register moving forward at an agreed upon date, say January 1st, 2019, how do you handle past sales tax that is due?
 - I am assuming that sellers would have to still register for sales tax permits in all the states they had nexus, file the past sales tax returns, pay the past sales tax due and close out their accounts – like how Washington is going after sales tax due prior to January 1, 2018.
 - The problem is that states should be able to give a time period that you have to pay your past sales tax, or your account will be suspended by the marketplace facilitator.
 - If you do not do this, you are letting all the past sellers who avoided sales tax the last 2-3 years off the hook and penalize all the ones who have come forward to pay past sales tax, go through amnesty and waive and agree to remit going forward... This could trigger a wave of legal action against companies who advised this was required and helped the sellers file past returns and pay past sales tax that was due. I had one client alone that paid over \$125K of past sales tax due.
 - **Scott Letourneau's input:**

- Sales Tax Permit registration continues to be required by the seller. In the end, what is the seller who is not selling on the marketplace but still sells on their own website? They need their own sales tax account in each state linked to their business.
- The marketplace facilitatory (with a merchant account) will collect and remit the sales tax to the state.
- To ease the burden of administrative reporting, have the states do two key points
 - **Past sales tax returns due**
 - Require an annual return only. If you are behind two years, file two years of returns and pay all the past sales tax due (penalties and interest).
 - Behind 8 months, file one return.
 - The problem is having to file a monthly return for two years in one state is 24 returns, x 20 states is 480 returns x \$50 a return is \$24,000 in fees (to a service provider) in past returns and a monster for the states to review and audit.
 - Allow for payment programs over 24 or 36 months to pay the past sales tax due so you don't put them out of business as they come forward.
 - **Sales Tax Returns Moving Forward:**
 - Raise the minimum sales tax to report monthly and quarterly. The goal is to switch more accounts to annual or monthly which will lessen the burden for compliance.
 - Only make a change on an annual basis (not during the year) if your sales go up and you go from quarterly to monthly (and if there is a chance, email along with mail the account for the update)
 - Waive any penalties if late the first filing after a chance also.
- Make it easier for those who sold in the past, out of business, to pay past sales tax due.
 - There are two groups here:
 - Sellers who have multiple accounts on a marketplace. I met one seller who had over 40 Amazon accounts (even though you are not supposed to have that many).
 - Some have had 5 past accounts, all closed, but never paid sales tax, and will have one active account that is paying sales tax.
 - Sellers who are out of the business because it did not go well. They are concerned about receiving sales tax notices years from now from multiple states.
 - The big question is will the states go after all closed accounts and cross reference if that person has an active

account and require them to get in compliance with all past sales tax due before their account is active again to sell? If not, you will get thousands of sellers who will simply close out their account and open a new one under a new entity and skip out on the past sales tax owed.

- The challenge is that some marketplaces do not transfer over your reviews when you change the name of your company, especially if under a different EIN. In many cases, it is fairly easy to set up a new company and move everything over, except you may be down for a week or 10 days while your EIN is verified with Amazon. If there is no threat to pay past sales tax or on past account, this will be a popular strategy to avoid past sales tax due.

4. Should the person registering, collecting, remitting tax and filing returns be the person whom the state should audit and require compliance with the state's recordkeeping requirements?

a. Scott Letourneau's input.

- b. The state should be able to audit
- i. The marketplace seller who is collecting and remitting the tax, separately audit
 - ii. The individual or business who registers for a sales tax permit.
 - iii. The states will need to put pressure on the marketplace seller to force compliance; it should audit what funds it will receive, and match that up with the sales tax return filed.
 - iv. The state should, at any time, be able to obtain the list of sellers from the marketplace facilitator to determine who closed an account and did not pay sales tax penalties and interest.

5. Should states imposing a sales volume-based economic nexus threshold for sales/use tax collection also consider adopting an economic—or factor presence--nexus threshold for income tax?

a. Scott Letourneau's input

- b. Absolutely. It has to be clear that a state tax return is only required when the economic nexus levels are passed (assuming the units will be removed).
- i. Example, seller on Amazon FBA, has only 20K in sales. They have to register for a permit and file sales tax returns because they are over the new \$10K threshold for inventory only, but they are under the \$100K level, so NO state income tax return is required, and NO foreign registration is required.
 - ii. Only when they pass the \$100K in a state (again removing the units part) do they need to file a state income tax return and/or foreign qualify in the state.
 - iii. Alternatively, the state may consider creating an information return (like Nevada, where under \$4-million it is a simple one-page return) that would be an extra bonus to the sellers. That one they could do on their own vs a full-blown state tax return, which may cost \$600 to \$800 per state for a tax firm to prepare.

6. Should states strive to simplify the registration process and require the minimum information necessary from the marketplace seller or facilitator?

a. Scott Letourneau's input

- i. Yes. First, everyone should be able to file online, even without a SSN or ITIN
 - 1. Come up with a code instead, where a separate affidavit is required -see Maryland and their approach.
 - a. This may take longer to verify and activate the account, just like applying for an EIN for a foreign seller with no SSN, the IRS takes 10 business days to approve.
- ii. The states should email any codes required to activate the account. Several states will mail out a notice after the application is applied for to then go back and log into your account.
- iii. Foreign registration should NOT be required as an out-of-state seller. Currently, Colorado, Oklahoma, and West Virginia require an entity to register with the state first, obtain that ID, then continue to register for a permit.

7. States should provide liability protection to marketplace facilitators when errors in collection and remittance are due to marketplace seller providing erroneous information to the marketplace facilitator?

a. Scott Letourneau's input:

- b. If the information provided by marketplace seller is not accurate and causes the marketplace facilitator to under-collect, the seller should be responsible, not the marketplace provider. One challenge is when a seller has products that are exempt from sales tax and others that are not. Will the marketplace over-collect because it collects sales tax on all products listed? Normally, this leads to over-reporting sales tax by the marketplace seller. The other issue will be how accurate are the tax settings by the marketplace facilitator in line with each state? Open to more input on this one from others.
- c. This is also why the seller needs to register for a permit, have their own account... (more accountability). What if a seller just says all his products are exempt from sales tax? Whose responsibility is it to monitor that? The marketplace facilitator is not going to want to have the expertise to evaluate everyone.

8. Should states include statutory provisions concerning protection of collecting marketplace facilitators against the risk of class action lawsuits?

- a. **Scott Letourneau's input.** Yes, because this is guaranteed to happen and may be right out of the gates if this comes across that those who were collecting and remitting the last three years are now NOT required to collect and remit. Those who did get into compliance will seek an attorney to sue the states representing all those who unnecessarily paid past sales tax, penalties, and interest out of their own pockets. You have to require compliance for past sales tax returns and sales tax due to avoid this issue.